

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 ROBERT EUGENE ALLEN,

10 Petitioner,

3:07-cv-00449-LRH-WGC

11 vs.

ORDER

12 JAMES BENEDETTI, *et al.*,

13 Respondents.
14 _____/

15
16 Introduction

17 This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Robert
18 Eugene Allen, a Nevada prisoner convicted of first degree murder with the use of a deadly weapon
19 and sentenced to two terms of life in prison with the possibility of parole. The case is before the
20 court for resolution of procedural default issues, and on the merits of the claims in Allen's amended
21 petition. The court will deny all the claims in the amended petition. The court will grant Allen a
22 certificate of appealability with respect to one of Allen's claims (Ground 3).

23 Factual Background and Procedural History

24 In its January 9, 2007, order affirming Allen's conviction in sentence, the Nevada Supreme
25 Court summarized the facts of the case as follows:

26 The evidence showed that Allen believed that his wife [Laurel] was having an affair
27 with another man. On August 18, 2003, the night of the murder, Laurel received a
28 telephone call. Suspicious, Allen checked the caller identification function on the
telephone and recognized the number as being one that had been received several
times previously. Later that evening, after eating dinner and after Laurel showered,

1 Allen applied lotion to her back for a skin condition she had. Allen testified that as he
2 applied the lotion, he thought about the telephone call and became increasingly upset.
3 He testified that he snapped and struck Laurel in the head with an antique iron. Allen
4 further testified that he did not remember retrieving a knife from the kitchen and
stabbing Laurel. After the attack, Allen drove to a friend's house and told his friend
that he hit Laurel with an iron, crushing her skull, and that he had stabbed her.

5 Laurel's autopsy revealed that she suffered multiple lacerations on her scalp
6 and fractures of her skull. Her most significant injury and the one that caused her
death was a 4- to 5-inch-deep stab wound that extended from her neck, across her
jugular vein, and into her chest cavity, piercing her lung.

7 Order of Affirmance, Exhibit 38, pp. 1-2.¹

8 Allen was charged in a criminal complaint with open murder with use of a deadly weapon
9 (Exhibit 2), and a preliminary hearing was held on October 1, 2003. *See* Transcript of Preliminary
10 Hearing, Exhibit 4. Following the preliminary hearing, Allen was held to answer the charge in the
11 state district court, and on October 10, 2003, he was charged by information. *See* Information,
12 Exhibit 5. On October 23, 2003, Allen pled not guilty. *See* Transcript of Proceedings of
13 October 23, 2003, Exhibit 6.

14 Following a jury trial, conducted between June 27 and July 1, 2005, Allen was convicted
15 of first degree murder with the use of a deadly weapon, and he was sentenced to a term of life in
16 prison with the possibility of parole, plus an equal and consecutive term on the deadly weapon
17 enhancement. *See* Transcript of Jury Trial, Exhibit 19, pp. 40-44 (jury's return of verdict); Verdict,
18 Exhibit 21; Transcript of Sentencing Hearing, Exhibit 22; Judgment of Conviction, Exhibit 23.

19 Allen appealed. *See* Notice of Appeal, Exhibit 24. The Nevada Supreme Court affirmed the
20 judgment of conviction on January 9, 2007. *See* Order of Affirmance, Exhibit 38; Judgment, Exhibit
21 39. The Nevada Supreme Court issued its remittitur on February 6, 2007. Remittitur, Exhibit 41.

22 On September 26, 2007, Allen initiated this federal habeas corpus action by submitting a
23 pro se habeas corpus petition (ECF No. 8). The court initially denied Allen's motion for
24 appointment of counsel (ECF Nos. 19, 20). Allen then filed a pro se amended habeas petition (ECF
25 No. 22). Allen also filed a new motion for appointment of counsel; the court reconsidered the
26 question of appointment of counsel and granted that motion, and appointed the federal public

27
28 ¹ The exhibits referenced in this order are those filed by Allen and located in the record at
ECF No. 28, 29, 30, 31, and 40 (Exhibits 1 through 67).

1 defender (FPD) to represent Allen (ECF Nos. 21, 23, 25, 26). On February 2, 2009, counsel filed, on
2 Allen's behalf, a further amended habeas petition (ECF No. 27).² Then, on February 9, 2009,
3 counsel filed a stipulation (ECF No. 33), whereby the parties agreed to a stay of this action pending
4 Allen's exhaustion of claims in state court. The court approved that stipulation, and ordered the case
5 stayed on February 10, 2009 (ECF No. 35).

6 On March 6, 2009, Allen, acting pro se, filed a petition for writ of habeas corpus in the state
7 district court. Petition for Writ of Habeas Corpus, Exhibit 50. On April 8, 2009, the State filed a
8 motion to dismiss that action, contending it was untimely filed. State's Response and Motion to
9 Dismiss, Exhibit 52. Allen did not file a timely response to that motion to dismiss, but had included
10 in his state petition his excuse for his late filing: he asserted that there was good cause for the late
11 filing because he did not timely receive trial transcripts from the attorneys who had represented him
12 on his direct appeal. *See* Petition for Writ of Habeas Corpus, Exhibit 50, pp. 7-9. On May 21, 2009,
13 the state district court dismissed Allen's habeas petition as barred by the statute of limitations at
14 NRS 34.726(1). *See* Findings of Fact, Conclusions of Law, and Order, Exhibit 54; *see also*
15 Transcript of Proceedings of May 7, 2009, Exhibit 53.

16 On June 2, 2009, Allen, then represented by the FPD, filed a motion to reconsider the
17 dismissal of that action. *See* Memorandum of Points and Authorities in Support of Motion for
18 Reconsideration, Exhibit 55. On June 4, June 24, and July 8, 2009, the state district court held
19 hearings regarding the motion for reconsideration, and ultimately denied the motion. *See* Transcript
20 of Proceedings of June 4, 2009, Exhibit 57; Transcript of Proceedings of June 24, 2009, Exhibit 58;
21 Transcript of Proceedings of July 8, 2009, Exhibit 62.

22 While the motion for reconsideration was pending, Allen appealed. *See* Notice of Appeal,
23 Exhibit 59. Allen also filed, in the Nevada Supreme Court, an emergency motion for stay and for
24 order of remand. *See* Emergency Motion for Stay and Order Directing Remand, Exhibit 60. The
25 Nevada Supreme Court denied that motion. *See* Order Denying Motion, Exhibit 61.

26
27 ² The amended petition filed on Allen's behalf on February 2, 2009, is the operative petition in
28 the case. Counsel entitled it a "first amended" petition, but that title is technically incorrect, as Allen
previously filed an amended petition on June 9, 2008 (ECF No. 22). At any rate, hereafter, in this order,
the court refers to the February 2, 2009, amended petition (ECF No. 27) as Allen's "amended petition."

On September 10, 2010, the Nevada Supreme Court affirmed the state district court's ruling that Allen's state habeas petition was time-barred, and also ruled that certain of his claims were barred by NRS 34.810(1)(b), because they could have been raised on his direct appeal. *See* Order of Affirmance, Exhibit 67.

The stay of this federal habeas corpus action was lifted on August 9, 2011. *See* Order entered August 9, 2011 (ECF No. 39).

On October 4, 2011, respondents filed a motion to dismiss, arguing that Grounds 3, 4, 5, 6, and 7 of Allen's amended habeas petition are barred by the doctrine of procedural default (ECF No. 42). On September 13, 2012, the court denied respondents' motion to dismiss, without prejudice, and directed the parties to file an answer and a reply addressing the merits of Allen's claims, and also further addressing the procedural default issues. *See* Order entered September 13, 2012 (ECF No. 49).

Respondents filed an answer (ECF No. 52) on November 16, 2012, and Allen filed a reply (ECF No. 54) on February 14, 2013.

Analysis of Allen's Claims

Ground 1

In Ground 1 of his amended petition, Allen claims that he "is in custody in violation of his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution because no rational jury could have concluded beyond a reasonable doubt that Allen was guilty of first-degree murder." Amended Petition, p. 3.

Allen raised this claim before the Nevada Supreme Court on his direct appeal (*see* Appellant's Opening Brief, Exhibit 35, pp. 4-8), and the Nevada Supreme Court ruled as follows:

When reviewing for sufficiency of the evidence, "[t]he relevant inquiry for this Court is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" [Footnote: *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)).] Here, Allen testified that the telephone call that precipitated his attack on Laurel occurred two to three hours before the killing. Further, during the attack he ceased beating Laurel with the iron, retrieved a knife from the kitchen, returned to the bedroom, and stabbed her in the neck, delivering the fatal wound.

A conviction for first-degree murder requires proof beyond a reasonable doubt

that the killing was willful, *i.e.*, with the intent to kill, deliberate, and premeditated. [Footnote: NRS 200.030; *Byford v. State*, 116 Nev. 215, 234, 994 P.2d 700, 713 (2000).] Deliberation connotes “a dispassionate weighing process and consideration of consequences before acting.” [Footnote: *Byford*, 116 Nev. at 235, 994 P.2d at 714.] Premeditation “is a design, a determination to kill, distinctly formed in the mind.” [Footnote: *Id.* at 237, 994 P.2d at 714.] We conclude that the jury could have found that the killing was willful, deliberate, and premeditated from the evidence showing that Allen beat his wife several hours after she received the telephone call he claims enraged him and that he ceased the beating long enough to retrieve a knife from the kitchen and inflict the fatal wound. Therefore, we conclude that the evidence sufficiently supports the jury’s finding of first-degree murder.

Order of Affirmance, Exhibit 38, pp. 2-3.

28 U.S.C. § 2254(d) provides the standard of review applicable to this claim under the Antiterrorism and Effective Death Penalty Act (AEDPA):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more than

1 incorrect or erroneous; the state court's application of clearly established law must be objectively
2 unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

3 The Supreme Court has further instructed that "[a] state court's determination that a claim
4 lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the
5 correctness of the state court's decision." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (citing
6 *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has also emphasized "that
7 even a strong case for relief does not mean the state court's contrary conclusion was unreasonable."
8 *Id.* (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 131 S.Ct.1388, 1398 (2011)
9 (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating
10 state-court rulings, which demands that state-court decisions be given the benefit of the doubt"
11 (internal quotation marks and citations omitted)).

12 The analysis under section 2254(d) looks to the law that was clearly established by United
13 States Supreme Court precedent at the time of the state court's decision. *Wiggins v. Smith*, 539 U.S.
14 510, 520 (2003).

15 The United States Supreme Court case of *Jackson v. Virginia*, 443 U.S. 307 (1979), sets forth
16 the test governing a claim that there was insufficient evidence to support a conviction. In *Jackson*,
17 the Supreme Court held, "the relevant question is whether, after viewing the evidence in the light
18 most favorable to the prosecution, *any* rational trier of fact could have found the essential elements
19 of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original).

20 This court agrees with the ruling of the Nevada Supreme Court. There was ample evidence
21 upon which rational jurors could have found Allen's killing of Laurel to be willful, deliberate, and
22 premeditated, including: the number and nature of the wounds Allen inflicted upon Laurel (*see*
23 Testimony of Dr. Gary Telgenhoff, Exhibit 17, pp. 4-20; Autopsy Report, Exhibit 44); the evidence
24 that their marital problems -- including Allen's suspicions that Laurel was having an affair -- had
25 been going on for at least six months before Allen killed her (*see* Testimony of Herbert Brown,
26 Exhibit 17, pp. 99-100, 103-04, 114; Testimony of Melvin Grant, Exhibit 18, pp. 31-33, 40;
27 Testimony of Robert Eugene Allen, Exhibit 18, pp. 49-53, 56; Allen's Statement to Police, Exhibit
28 47, pp. 2-3); the evidence that there had been, before the night of the killing, many telephone calls

1 that Allen found to be suspicious (*see* Testimony of Herbert Brown, Exhibit 17, p. 96; Testimony of
 2 Robert Eugene Allen, Exhibit 18, pp. 82-83); the evidence that significant time -- at least two to two
 3 and a half hours -- passed between the telephone call and the killing (*see* Testimony of Robert
 4 Eugene Allen, Exhibit 18, pp. 64-66, 83-84); the evidence that the police found, at the scene, a
 5 kitchen drawer open, with blood drops in it, and blood drops on the floor beneath it, suggesting that,
 6 after Allen beat Laurel with the antique iron, he went to the kitchen to get a knife to use to deliver
 7 the fatal blow (*see* Testimony of Stephanie Fox, Exhibit 18, p. 13); and the detailed description of
 8 the killing that Allen gave to Herbert Brown (*see* Testimony of Herbert Brown, Exhibit 17, p. 102;
 9 Testimony of Robert Eugene Allen, Exhibit 18, p. 87).

10 The Nevada Supreme Court's determination that there was sufficient evidence that the killing
 11 in this case was willful, deliberate, and premeditated, was neither contrary to, nor an unreasonable
 12 application of, clearly established federal law, and was not based on an unreasonable determination
 13 of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d).

14 Ground 2

15 In Ground 2, Allen claims that he "is in custody in violation of his right to due process and a
 16 fair trial under the Fifth, Sixth, and Fourteenth Amendments because the State was allowed to admit
 17 irrelevant and highly prejudicial evidence about a prior domestic assault." Amended Petition, p. 5

18 Allen raised this claim on his direct appeal. *See* Appellant's Opening Brief, Exhibit 35,
 19 pp. 8-13. The Nevada Supreme Court ruled as follows:

20 Allen next argues that the district court erred in admitting prior bad act
 21 evidence. Although such evidence is generally inadmissible, it may be introduced to
 22 show, for example, "motive, opportunity, intent, preparation, plan, knowledge,
 23 identity, or absence of mistake or accident." [Footnote: NRS 48.045(2).] Prior to
 24 admitting prior bad act evidence, the district court must conduct a *Petrocelli*
 25 [footnote: *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985)] hearing to establish
 whether "(1) the [prior bad act] is relevant to the crime charged; (2) the act is proven
 by clear and convincing evidence; and (3) the probative value of the evidence is not
 26 substantially outweighed by the danger of unfair prejudice." [Footnote: *Rosky v.*
 27 *State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005) (quoting *Tinch v. State*, 113 Nev.
 28 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).]

Here, the district court held a *Petrocelli* hearing to determine the admissibility
 of evidence of a domestic violence incident between Allen and Laurel that occurred
 several weeks before the murder. The evidence presented at the hearing revealed that
 on June 27, 2003, Laurel's son, Aaron Dahl, heard banging noises emanating from
 Laurel and Allen's bedroom. Dahl heard his mother repeatedly scream, "Help me."

1 Dahl dialed 9-1-1 and then successfully gained entry into the locked bedroom. He
2 observed Laurel sitting on the floor in the corner of the bedroom. Allen exited the
3 bedroom and waited outside for the police to arrive. Henderson Police Officer
4 Mitchell Wilson testified that when he arrived, Laurel was crying, “visibly afraid,”
5 and shaking. He stated that Laurel told him that earlier in the evening she and Allen
6 had discussed their marital problems, including his suspicion that she was having an
7 affair. Allen became upset, and as she got out of bed, Allen grabbed her wrist and
8 pulled her back on the bed. Laurel screamed for help, and Allen let go of her,
9 grabbed a three-inch buck knife, and threatened to kill himself. Officer Wilson stated
10 that Laurel told him that she attempted to exit the bedroom but Allen grabbed her and,
11 for a short time, prevented her from leaving. Officer Wilson testified that he
12 observed physical injuries to Laurel’s wrist and arms. He further stated that he issued
13 Allen a citation for domestic battery.

14 After considering the evidence presented, the district court concluded that the
15 incident on June 27 was relevant to demonstrate ill will and motive, that it was
16 proven by clear and convincing evidence, and that its probative value exceeded any
17 prejudice. We will not reverse on appeal a district court’s decision to admit or
18 exclude prior bad act evidence absent manifest error. [Footnote: *Id.*] Allen’s defense
19 at trial was that after Laurel received a suspicious telephone call, he became enraged
20 by the thought of her having an affair and killed her. The evidence shows that the
21 physical altercation on June 27 also erupted as a result of marital discord because
22 Allen suspected Laurel of being unfaithful. We conclude that the prior bad act was
23 relevant to show Allen’s motivation for killing Laurel and satisfied the other *Tinch*
24 factors necessary for its admission. Therefore, we conclude that the district court did
25 not err in admitting this evidence.

26 Order of Affirmance, Exhibit 38, pp. 3-5.

27 Allen cites no controlling United States Supreme Court precedent, in support of this claim,
28 and he makes no assertion that the Nevada Supreme Court’s ruling was contrary to any such
precedent. *See* Amended Petition, pp. 5-7; Reply (ECF No. 54), pp. 8-9. In fact, Allen recognizes
that in *Alberni v. McDaniel*, 458 F.3d 860 (9th Cir.2006), the court of appeals stated that “the
Supreme Court has not ‘clearly established’ the principle that ‘introduction of propensity evidence
may violate due process’ for purposes of habeas review,” and Allen states that he “would
respectfully present the claim to preserve it for further review.” Reply, p. 9, citing *Albierni*, 458 F.3d
at 864-67.

Given the standard of review applicable to this claim under 28 U.S.C. § 2254(d), and given
the dearth of United States Supreme Court precedent supporting this claim, the court finds Ground 2
to be meritless. As the Supreme Court has never squarely addressed the issue raised in Ground 2
(*see Alberni*, 458 F.3d at 864-67), the state supreme court’s rejection of this claim was not contrary
to, and did not involve an unreasonable application of, clearly established Supreme Court precedent.

1 See 28 U.S.C. § 2254(d).

2 Ground 3

3 In Ground 3 of his amended habeas petition, Allen claims that “[d]uring voir dire, the
4 prosecutor struck a black juror because of her race,” and “[a]s a result, Mr. Allen is imprisoned in
5 violation of his right to equal protection under the Fourteenth Amendment of the United States
6 Constitution.” Amended Petition, p. 8.

7 The Nevada Supreme Court held this claim to be procedurally barred, because Allen’s state
8 habeas petition was filed outside the applicable one-year limitations period, and, also, because the
9 claim was not raised on Allen’s direct appeal. See Order of Affirmance, Exhibit 67. Respondents
10 contend that this claim is, therefore, barred in this federal habeas corpus action by the procedural
11 default doctrine. See Answer, pp. 7-11; see also Motion to Dismiss (ECF No. 42), pp. 4-6.

12 In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court held that a state
13 prisoner’s failure to comply with the state’s procedural requirements in presenting his claims is
14 barred from obtaining a writ of habeas corpus in federal court by the adequate and independent state
15 ground doctrine. *Coleman*, 501 U.S. at 731-32 (“Just as in those cases in which a state prisoner fails
16 to exhaust state remedies, a habeas petitioner who has failed to meet the State’s procedural
17 requirements for presenting his federal claims has deprived the state courts of an opportunity to
18 address those claims in the first instance”). Where such a procedural default constitutes an adequate
19 and independent state ground for the denial of habeas corpus relief, the default may be excused only
20 if “a constitutional violation has probably resulted in the conviction of one who is actually innocent,”
21 or if the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v.*
22 *Carrier*, 477 U.S. 478, 496 (1986).

23 A state procedural bar is “adequate” if it is “clear, consistently applied, and well-established
24 at the time of the petitioner’s purported default.” *Calderon v. United States Dist. Court*, 96 F.3d
25 1126, 1129 (9th Cir.1996) (quoting *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir.1994)). A state
26 procedural bar is “independent” if the state court “explicitly invokes the procedural rule as a separate
27 basis for its decision.” *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir.2003).

28 ///

1 To demonstrate cause for a procedural default, the petitioner must “show that some objective
2 factor external to the defense impeded” his efforts to comply with the state procedural rule. *Murray*,
3 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner
4 from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect to the
5 prejudice prong, the petitioner bears “the burden of showing not merely that the errors [complained
6 of] constituted a possibility of prejudice, but that they worked to his actual and substantial
7 disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.” *White v.*
8 *Lewis*, 874 F.2d 599, 603 (9th Cir.1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982).

9 Responding to the respondents’ procedural default defense, Allen argues that he can show
10 cause for the procedural default: he claims that he was unable to raise this claim within Nevada’s
11 one-year limitations period because of his former counsel’s failure to provide him the files necessary
12 to raise the claim, in spite of his persistent and repeated requests for the files. *See* Opposition to
13 Motion to Dismiss (ECF No. 47), pp. 8-17. Allen also argues that, because of the manner in which
14 the state procedural rules were applied in his case, those rules were not adequate to support a
15 procedural default. *Id.* at 10-12, 14-16.

16 The court finds that, even assuming for purposes of analysis that Allen can show cause for
17 his procedural default of this claim, he does not show prejudice. And, similarly, even if it is
18 assumed that the state procedural rules, as applied in this case by the state courts, were inadequate to
19 support application of the procedural default doctrine, Allen is not entitled to relief on this claim. In
20 short, the court finds that habeas corpus relief is not warranted with respect to Ground 3.

21 The AEDPA standard does not apply where the state supreme court rejected a federal claim
22 on procedural grounds and did not reach its merits. *Harrington*, 131 S.Ct. at 784-85. In such a case,
23 the federal habeas court reviews the claim de novo. *Chaker v. Crogan*, 428 F.3d 1215, 1221 (9th
24 Cir.2005) (applying de novo standard of review to a claim in a habeas petition that was not
25 adjudicated on the merits by the state court); *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir.2004)
26 (same). That is the case here; the Nevada Supreme Court has not ruled on the claim that is Ground 3
27 of Allen’s federal habeas petition. This court, then, considers that claim de novo.

28 ///

1 In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the use of race-based
2 peremptory challenges to excuse prospective jurors runs afoul of the Equal Protection Clause of the
3 Fourteenth Amendment. *Batson*, 476 U.S. at 89. Courts are to evaluate *Batson* claims using a
4 three-part test. *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir.2006) (en banc). “First, the defendant
5 must make a prima facie showing that a challenge was based on race. Second, the prosecution must
6 offer a race-neutral basis for the challenge. Third, the court must determine whether the defendant
7 has shown ‘purposeful discrimination.’” *Id.* (quoting *Batson*, 476 U.S. at 98). The “ultimate burden
8 of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the
9 strike.” *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

10 Allen is a black man; his wife, whom he killed, was a white woman. *See* Amended Petition,
11 p. 8. During voir dire, the prosecution used a peremptory challenge to strike a black juror. *See*
12 Transcript of Jury Trial, Exhibit 16, pp. 45-52, 69. After the defense objected, the prosecutor stated:

13 Judge, the race-neutral reason is simply her background as a teacher. My
14 experience in past jury trials is, I don’t have good experiences with people with a
teaching background, for whatever reason.

15 It’s just instinct, it’s hunch. It had nothing to do with her race. There’s other
16 African-American people on this jury. I certainly had no intent to exclude anyone
based on race.

17 *Id.* at 154.

18 Allen argues that the prosecutor’s explanation, that he challenged the juror because of her
19 teaching background, was irrational and was a pretext for purposeful discrimination, but he proffers
20 little evidence in support of that argument. *See* Reply, pp. 9-17. The court concludes that Allen has
21 not met his burden under the third part of the *Batson* analysis. Allen points out that there were four
22 other potential jurors who had teaching backgrounds, and that the prosecution did not use
23 peremptory challenges to strike any of them, but, upon closer inspection, that does not amount to
24 substantial evidence of purposeful discrimination: three of those potential jurors were challenged by
25 the defense, and did not make it onto the jury, and the fourth was not currently teaching, but was
26 employed in a “home outreach program.” *See* Reply, p. 16. Allen does not proffer any evidence that
27 could establish that the prosecution’s peremptory challenge was based on purposeful racial
28 discrimination.

1 The court will deny habeas corpus relief with respect to Ground 3.

2 Ground 4

3 In Ground 4, Allen claims that “[a] jail employee informed the entire panel at the outset of
4 voir dire that Allen was incarcerated, that he had received information about the case from Allen,
5 and that he could not be an impartial juror for those reasons,” and “[a]s a result, Mr. Allen was
6 deprived of his right to a fair trial and an impartial jury under the Fifth, Sixth, and Fourteenth
7 Amendments of the United States Constitution.” Amended Petition, p. 9.

8 Here again, the Nevada Supreme Court held this claim to be procedurally barred in state
9 court, because Allen’s state habeas petition was filed outside the applicable limitations period, and
10 also because the claim was not raised on Allen’s direct appeal. *See* Order of Affirmance, Exhibit 67.
11 Respondents contend, therefore, that this claim is barred by the procedural default doctrine. *See*
12 Answer, pp. 7-11; *see also* Motion to Dismiss (ECF No. 42), pp. 4-6. Allen argues, in response, that
13 he can show cause for the procedural default, in that he was unable to raise this claim within
14 Nevada’s one-year limitations period because of his former counsel’s failure to provide him files
15 necessary to raise the claim, in spite of his persistent and repeated requests for the files. *See*
16 Opposition to Motion to Dismiss, pp. 8-17. Allen also argues that, because of the way the state
17 procedural rules were applied in his case, those rules were not adequate, such that they could support
18 a procedural default. *Id.* at 10-12, 14-16. Here again, the court assumes for purposes of analysis that
19 Allen can show cause for his procedural default, but finds that he cannot show prejudice with respect
20 to this claim. And, even if it is assumed that the state procedural rules were inadequate, as applied in
21 this case, Allen is not entitled to relief on this claim. The court finds the claim in
22 Ground 4 to be without merit.

23 As the Nevada Supreme Court has not ruled on the claim in Ground 4, this court considers
24 the claim de novo. *See Chaker*, 428 F.3d at 1221; *Lewis*, 391 F.3d at 996.

25 Ground 4 is based on the following exchange between the judge and a potential juror, which
26 took place in the presence of the other potential jurors during jury voir dire:

27 Prospective Juror Molnar: I work in the Clark County Detention Center
28 and I know the defendant.

1 The Court: And your name is what?

2 Prospective Juror Molnar: Mr. Molnar, 19-0176, on daily basis.

3 The Court: But had you heard anything particular about this case before
4 today, any particulars?

5 Prospective Juror Molnar: Just from him and the other people in the
6 modules.

7 The Court: All right. But no newspaper, radio or TV?

8 Prospective Juror Molnar: No, sir. And I know a number of people on the
9 list just from working down in booking. I know the officers.

10 The Court: Well, do you think you can objectively evaluate all this?

11 Prospective Juror Molnar: No, I don't think so.

12 The Court: Frankly, I'm a little surprised they assigned you to a criminal
13 trial.

14 Prospective Juror Molnar: I am too, sir. And I know you too, sir.

15 The Court: Would counsel stipulate to having him reassigned to a civil
16 matter?

17 Mr. Waters [prosecutor]: Yes, Your Honor.

18 The Court: Because this has got to be a little trying on you. Well, aside
19 from that.

20 Why don't you go downstairs and ask them to assign you to another case.

21 See Transcript of Jury Trial, Exhibit 15, pp. 19-20.

22 Allen claims that this exchange, before the other prospective jurors, "caused unfair and
23 irreversible prejudice to Mr. Allen." Amended Petition, p. 10. Allen argues: "The jury was
24 informed that Allen had [been] incarcerated, an irrelevant fact that unfairly suggested to the jury that
25 Allen was dangerous." *Id.* Allen also argues:

26 Molnar further stated that he had received information about the case from other
27 people in the jail, and from Mr. Allen himself. As a result of this knowledge,
28 Mr. Molnar stated that he could not be an impartial juror. The jury panel, thus, was
left to speculate about damaging information Mr. Allen and others had provided to
Molnar that made him unable to serve as a juror at his trial.

Id. (citation to trial transcript omitted).

Allen's trial counsel raised this issue during the voir dire, and asked that a new panel of
prospective jurors be selected. See Transcript of Jury Trial, Exhibit 16, pp. 3-4. The trial court

1 denied that request, stating:

2 The Court: Well, as to Officer Molnar's reference to his knowledge of the
3 defendant, it occurred to me at the time that it was pretty much neutral.

4 * * *

5 He just indicated that he knew the defendant and he couldn't be objective or unbiased,
6 I think he said.

7 To my way of thinking it cuts both ways, really. There was nothing critical
8 that I sensed of Officer Molnar's opinion of the defendant. He just said he knew him
9 and he talked to him and, of course, he went into this thing about knowing him at the
10 jail which, undoubtedly, that is a fact which the jury is aware of, which is not my
11 preference, certainly.

12 I would say, however, two things on that issue. First of all, I think most
13 people on the street, the jury including, would presume that someone charged with
14 murder would not be out running around loose.

15 And, secondly, I think the major concern that jurors not be aware that
16 someone is in custody is not so much the fact alone that they're in custody. I think
17 the genesis of that was some years back when people were drug over from the jail in
18 their jail garb, and there was a dehumanizing effect of them being prisoners wedged
19 in between these attorneys, and kind of an object rather than a human being.

20 I think it's more the specter of seeing someone in jail garb, than the
21 knowledge that the person is perhaps in jail.

22 So on balance I don't see that there's been any real damage done, although
23 there is a matter of concern.

24 *See* Transcript of Jury Trial, Exhibit 16, pp. 5-7.

25 This court finds that the exchange between the judge and prospective juror, before the other
26 prospective jurors, was not such that it would bias the other prospective jurors, or render Allen's trial
27 unfair.

28 The exchange did suggest that, after he killed Laurel, Allen had been in custody at the jail, at
least at some point, and at least for some amount of time. However, the fact that Allen was in
custody was no secret; that fact would eventually become plain to the jury, as a result of the
testimony of various witnesses. *See* Testimony of Officer David Schumer, Exhibit 17, pp. 23-26;
Testimony of Officer Richard Huber, Exhibit 17, pp. 32-34; Testimony of Officer Mitchell Wilson,
Exhibit 17, pp. 77-78; Testimony of Detective John Williams, Exhibit 17, pp. 118-20. In light of the
testimony indicating that Allen was taken into custody following Laurel's murder, Allen's trial was
not rendered unfair by the vague indication, by prospective juror Molnar, that Allen had at some

1 point, for some unspecified amount of time, been at the county jail.

2 As for the other part of Allen's argument -- that prospective juror Molnar suggested to the
3 other prospective jurors that he had some prejudicial information regarding Allen -- the court finds
4 that there was no information conveyed that could possibly have rendered Allen's trial unfair.
5 Certainly, there were no particular prejudicial facts about Allen conveyed to the other prospective
6 jurors. And, prospective juror Molnar's statement that he could not objectively evaluate the
7 evidence appeared, in context, to be based more upon his general status as a law enforcement officer
8 than upon any particular information he knew about Allen or about Laurel's murder.

9 Considering the entire exchange between the trial judge and prospective juror Molnar, in
10 light of all the evidence presented at the trial, the claim in Ground 4 fails; that exchange did not
11 render the jury biased, and it did not render Allen's trial unfair.

12 Ground 5

13 In Ground 5, Allen claims that the trial court "abused its discretion when it read the jury the
14 flight instruction when there was no evidence that Allen intended to flee for the purpose of avoiding
15 arrest and where he turned himself [in to] the police hours after the incident," and "[t]he trial court's
16 error deprived Allen of his right to a fair trial guaranteed by the Fifth, Sixth and Fourteenth
17 Amendments." Amended Petition, pp. 10, 11.

18 As with the claims in Grounds 3 and 4, the Nevada Supreme Court held this claim to be
19 procedurally barred in state court, because Allen's state habeas petition was filed outside the
20 applicable one-year limitations period, and, also, because the claim was not raised on Allen's direct
21 appeal. *See* Order of Affirmance, Exhibit 67. Respondents contend, therefore, that this claim is
22 barred by the procedural default doctrine. *See* Answer, pp. 7-11; *see also* Motion to Dismiss (ECF
23 No. 42), pp. 4-6. And, here again, Allen argues that he can show cause for the procedural default, in
24 that he was unable to raise this claim within Nevada's one-year limitations period because of his
25 former counsel's failure to provide him files necessary to raise the claim, in spite of his persistent
26 and repeated requests for the files. *See* Opposition to Motion to Dismiss, pp. 8-17. Allen also
27 argues, here too, that, because of the way the state procedural rules were applied in his case, those
28 rules were not adequate, such that they could support a procedural default. *Id.* at 10-12, 14-16. As

1 with the claims in Grounds 3 and 4, the court assumes for purposes of analysis that Allen can show
2 cause for his procedural default of Ground 5, but finds that he cannot show prejudice with respect to
3 this claim. And, even if it is assumed that the state procedural rules were inadequate, as enforced in
4 this case by the state courts, Allen is not entitled to relief on this claim. The court finds the claim in
5 Ground 5 to be without merit.

6 As the Nevada Supreme Court has not ruled on the claim in Ground, this court considers the
7 claim de novo. *See Chaker*, 428 F.3d at 1221; *Lewis*, 391 F.3d at 996.

8 The jury instruction that Allen challenges was as follows:

9 The flight of a person immediately after the commission of a crime, or after he
10 is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact
11 which, if proved, may be considered by you in light of all other proved facts in
12 deciding the question of his guilt or innocence. Whether or not evidence of flight
shows a consciousness of guilt and the significance to be attached to such a
circumstance are matters for your deliberation.

13 Jury Instructions, Exhibit 20, Instruction No. 23.

14 Allen objected to this instruction at trial, arguing that it was not supported by the evidence.
15 *See* Transcript of Proceedings of August 17, 2005, Exhibit 22, p. 4. The trial court disagreed, ruling
16 as follows:

17 The Court: Well, I thought the instruction did follow the State's theory of
18 the case and particularly that particular element of it.

19 It was left to the jury to believe or disbelieve whether there was a conscious
20 flight from authorities.

21 I thought there was sufficient evidence to warrant the reading of the
instruction. That's why it was given.

22 *Id.* at 5.

23 In his closing argument, the prosecutor presented argument based on the flight instruction, as
24 follows:

25 There is an instruction on flight, and it's Instruction No. 23. And you can
26 consider it's not proof in itself of a defendant's guilt, but you can consider it in
making your determination of guilt of the defendant.

27 If someone flees from the scene of a crime and does not stick around for the
28 police to arrive, you can take that into consideration. In this case the defendant after
killing his wife left the residence, left her lying there in a pool of blood. He didn't

1 call for medical help, he didn't call the police. He left.

2 Once he left he contemplated suicide. He went to his friend's house. He
3 didn't go to the police on his own. His friend kept him there at the house, washed his
4 clothes, prevented him from leaving so that he couldn't kill himself, and then
5 eventually talked him into and drove him to the police station. That's how they ended
up down there. So you can consider the fact that he fled the crime scene in your
deliberations.

6 Transcript of Jury Trial, Exhibit 18, pp. 101-02. And, defense counsel responded as follows, in his
7 closing argument:

8 Use your common sense. There was no effort to escape in this case as the
9 Prosecutor suggests. I mean, what is it about the word "escape" that I don't
understand? When somebody goes down to the police station, the jail, and he's not
even a suspect and he says here I am, is that what we call escape? Tell me what I'm
missing in my understanding of the word, "escape."

10 Transcript of Jury Trial, Exhibit 19, p. 20.

11 To the extent that Allen contends that the jury instruction violated his federal constitutional
12 right to due process of law, he must demonstrate that "the ailing instruction by itself so infected the
13 entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72
14 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The instruction must be considered in
15 the context of the trial record and the instructions as a whole. *Id.*; see also *Middleton v. McNeil*, 541
16 U.S. 433, 437-38 (2004). It is not sufficient to show that "the instruction is undesirable, erroneous,
17 or even 'universally condemned.'" *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (quoting *Cupp*,
18 414 U.S. at 154).

19 Here, there is no showing that it was error for the trial court to give the flight instruction,
20 much less that doing so infected Allen's entire trial, and rendered it unfair.

21 After he killed Laurel, Allen immediately left the scene of the murder. See Testimony of
22 Robert Eugene Allen, Exhibit 18, p. 66 ("I remember hitting her, and then the next thing I know I
23 walked out the front door and I get in the car."). Allen did not summon medical help for Laurel, and
24 he did not call the police. See Testimony of Robert Eugene Allen, Exhibit 18, pp. 85-86. Instead,
25 Allen went to the home of his friend, Herbert Brown, where he stayed for about two to two and a
26 half hours. See Testimony of Herbert Brown, Exhibit 17, pp. 93-99; Testimony of Robert Eugene
27 Allen, Exhibit 18, pp. 86-87. Allen expressed to Brown that he wanted to leave -- that he "wanted to
28

1 go out into the desert by himself and commit suicide” -- but Brown convinced him to stay.
2 Testimony of Herbert Brown, Exhibit 17, pp. 98-99, 109-10 (... “I wouldn’t let him leave”). Then, at
3 the urging of Brown, Allen went with Brown to the Las Vegas police station and turned himself in.
4 *See* Testimony of Herbert Brown, Exhibit 17, pp. 99, 109-10; Testimony of Robert Eugene Allen,
5 Exhibit 18, p. 68. This sequence of events could reasonably have been construed by the jury as flight
6 by Allen from the scene of the crime. The jury instruction was properly given, and the parties
7 properly argued the matter in their closing arguments. Ground 5 is without merit.

8 Ground 6

9 In Ground 6, Allen claims that he “is in custody in violation of his right to effective
10 assistance of trial counsel as guaranteed by the Sixth and Fourteenth Amendments to the United
11 States Constitution.” Amended Petition, p. 11. Ground 6 includes three subclaims, which may be
12 designated Grounds 6A, 6B, and 6C. In Ground 6A, Allen claims that his trial counsel “failed to
13 object to the crime scene and autopsy photographs.” *Id.* at 12. In Ground 6B, Allen claims that his
14 trial counsel “failed to properly present Allen’s theory of defense.” *Id.* at 13. In Ground 6C, Allen
15 claims that his trial counsel “failed to object to prosecutorial misconduct during closing argument.”
16 *Id.* at 15.

17 The Nevada Supreme Court held these claims of ineffective assistance of counsel to be
18 procedurally barred in state court, because Allen’s state habeas petition was filed outside the
19 applicable limitations period. *See* Order of Affirmance, Exhibit 67. Respondents contend, therefore,
20 that these claims are barred by the procedural default doctrine. *See* Answer, pp. 7-11; *see also*
21 Motion to Dismiss (ECF No. 42), pp. 4-6. In turn, Allen argues that he can show cause for the
22 procedural default, in that he was unable to raise this claim within Nevada’s one-year limitations
23 period because of his former counsel’s failure to provide him files necessary to raise the claim, in
24 spite of his persistent and repeated requests for the files. *See* Opposition to Motion to Dismiss, pp.
25 8-17. Allen also argues that, because of the way that the state-law statute of limitations was applied
26 in his case, it was not adequate, such that it could support a procedural default. *Id.* at 10-12, 14-15
27 Here again, the court assumes for purposes of analysis that Allen can show cause for his procedural
28 default, but finds that he cannot show prejudice with respect to these claims. And, even if it is

1 assumed that the state-law statute of limitations was inadequate, as applied in this case, Allen is not
2 entitled to relief on the claims in Ground 6. The court finds those claims to be without merit.

3 As the Nevada Supreme Court has not ruled on the claims in Ground 6 of Allen's federal
4 habeas petition, this court considers the claims de novo. *See Chaker*, 428 F.3d at 1221; *Lewis*, 391
5 F.3d at 996.

6 Ground 6A

7 In Ground 6A, Allen claims that his trial counsel "failed to object to the crime scene and
8 autopsy photographs." Amended Petition, p. 12.

9 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two
10 prong test for analysis of claims of ineffective assistance of counsel: a petitioner claiming
11 ineffective assistance of counsel must demonstrate (1) that his attorney's representation "fell below
12 an objective standard of reasonableness," and (2) that the attorney's deficient performance
13 prejudiced the defendant such that "there is a reasonable probability that, but for counsel's
14 unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S.
15 at 688; *see also id.* at 694. "A reasonable probability is a probability sufficient to undermine
16 confidence in the outcome." *Id.* at 694. The inquiry under *Strickland* is highly deferential, and
17 "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the
18 circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's
19 perspective at the time." *Id.* at 689. Thus, to satisfy *Strickland*'s first prong, deficient performance, a
20 defendant must overcome "the presumption that, under the circumstances, the challenged action
21 might be considered sound trial strategy." *Id.*

22 Allen claims that his trial counsel was ineffective for failing to object to admission of autopsy
23 photographs (Exhibit 46) and crime scene photographs (Exhibits 45, 48). *See* Amended Petition, pp.
24 12-13.

25 Allen, however, makes no showing that an objection to the admission of any of those
26 photographs would have been successful. While Allen admitted to killing Laurel, and while he
27 admitted, generally, to the manner in which he did so, the question in dispute was whether the killing
28 was first or second degree murder, or voluntary manslaughter. Allen's *mens rea* was at issue. The

1 photographs of the crime scene and the autopsy photographs had a bearing upon the precise manner
2 in which Allen committed the murder, and upon his actions before and after the murder, and
3 therefore, were relevant to the issue of his *mens rea*. The probative value of the crime-scene and
4 autopsy photographs outweighed any unfair prejudice that those photographs arguably could have
5 caused. Counsel will not be deemed ineffective for failing to raise a meritless issue. *See Lockhart v.*
6 *Fretwell*, 506 U.S. 364, 374 (1993) (O'Connor, J., concurring) (failing to raise a meritless objection
7 cannot constitute prejudice for purposes of a *Strickland* ineffective assistance of counsel claim).

8 Allen's trial counsel was not ineffective for failing to object to the admission into evidence of
9 the crime-scene and autopsy photographs.

10 Ground 6B

11 In Ground 6B, Allen claims that his trial counsel "failed to properly present Allen's theory of
12 defense." Amended Petition, p. 13. Here, Allen claims that, when he was testifying about his belief
13 that his wife was having an affair, and about his willingness to return to their home and try to repair
14 their marriage if she would discontinue the affair, and the prosecutor objected to certain of that
15 testimony on hearsay grounds, his counsel did not do enough to attempt to overcome those
16 objections. *See id.* at 13-14; *see also* Testimony of Robert Eugene Allen, Exhibit 18, pp. 49, 51, 61.

17 In fact, though, a review of Allen's testimony, and the testimony of Herbert Brown, reveals
18 that Allen's counsel was successful in eliciting ample evidence to show that Allen strongly believed
19 that Laurel was cheating on him, in order to support his theory that Allen's killing of Laurel was in
20 the heat of passion. *See* Testimony of Robert Eugene Allen, Exhibit 18, pp. 49-54, 59-66; 71-72;
21 *see also* Testimony of Herbert Brown, Exhibit 17, pp. 95-97, 99-100, 103-04.

22 Allen does not show, with any specificity, what further testimony he could have given, how
23 any such further testimony would have added support to his defense, or how it could possibly have
24 changed the outcome of his trial.

25 Ground 6B is meritless.

26 Ground 6C

27 In Ground 6C, Allen claims that his trial counsel "failed to object to prosecutorial misconduct
28 during closing argument." Amended Petition, p. 15.

1 First, Allen argues that his trial counsel was ineffective for not objecting to the following
2 argument made by the prosecutor in his closing argument:

3 Why? Because the defendant suspected she was seeing another man. He
4 suspected, he didn't know it. He had gotten -- Laurel had received some phone calls
5 that he didn't understand. He questioned her about it. He didn't believe her answers,
6 but he had not one shred of proof that she was even cheating on him.

7 Transcript of Trial, Exhibit 18, p. 89; *see* Amended Petition, p. 15. Allen does not make a cogent
8 argument, legally supported, that this argument was improper. As Allen's *mens rea* was at issue, so
9 was his motivation for killing Laurel, and, therefore, so was the factual basis for his motivation -- the
10 events that led him to believe Laurel was cheating on him. This was properly a subject of the
11 prosecution's argument, and that argument was not prosecutorial misconduct. Allen's counsel was
12 not ineffective for not objecting to this argument. Moreover, this argument plainly was not of such
13 gravity that a successful objection, if that were possible, could have affected the outcome of the trial.

14 Allen also argues that his counsel was ineffective for not objecting to the following
15 argument, which was made by the prosecutor in his closing argument:

16 And then there was this [notion] that toxins took over [his] head. Where is the
17 evidence? Where is the testimony about toxins? Where is the expert testimony about
18 someone being outside themselves? It doesn't exist.

19 Transcript of Trial, Exhibit 19, p. 36; *see* Amended Petition, p. 15. Allen argues that this was a
20 "clear example of burden shifting." *Id.* Actually, this was not a clear example of burden shifting.
21 The prosecutor did not state, or insinuate, that there was any burden of proof on the defense. Rather,
22 the prosecutor asserted that an argument made by the defense was unsupported by evidence. The
23 prosecutor's argument appears to have been proper. *See United States v. Cabrera*, 201 F.3d 1243,
24 1250 (9th Cir.2000) ("A prosecutor's comment on a defendant's failure to call a witness does not
25 shift the burden of proof, and is therefore permissible, so long as the prosecutor does not violate the
26 defendant's Fifth Amendment rights by commenting on the defendant's failure to testify."); *United*
27 *States v. Vaandering*, 50 F.3d 696, 701-02 (9th Cir.1995) (same). Moreover, even if this argument
28 by the prosecutor were considered somehow improper, the argument was not such that the outcome
of the trial might have been altered by a successful objection.

Ground 6C is without merit.

1 Ground 7

2 In Ground 7, Allen claims that he “is in custody in violation of his right to the effective
3 assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United
4 States Constitution where appellate counsel failed to raise any issues regarding the voir dire.”
5 Amended Petition, p. 16. Allen’s argument is that his appellate counsel was ineffective for failing to
6 raise, on his direct appeal, the claims stated in Grounds 3 and 4 of his federal habeas petition. *Id.*

7 The Nevada Supreme Court held these claims of ineffective assistance of appellate counsel to
8 be procedurally barred in state court, because Allen’s state habeas petition was filed outside the
9 applicable one-year limitations period. *See* Order of Affirmance, Exhibit 67. Respondents contend,
10 therefore, that this claim is barred by the procedural default doctrine. *See* Answer, pp. 7-11; *see also*
11 Motion to Dismiss (ECF No. 42), pp. 4-6. In turn, Allen argues that he can show cause for the
12 procedural default, in that he was unable to raise this claim within Nevada’s one-year limitations
13 period because of his former counsel’s failure to provide him files necessary to raise the claim, in
14 spite of his persistent and repeated requests for the files. *See* Opposition to Motion to Dismiss, pp.
15 8-17. And, Allen also argues that, because of the way that the state-law statute of limitations was
16 applied in his case, it was not adequate, such that it could support a procedural default. *Id.* at 10-12,
17 14-15. Here again, the court assumes for purposes of analysis that Allen can show cause for his
18 procedural default, but finds that he cannot show prejudice with respect to Ground 7. And, even if it
19 is assumed that the state-law statute of limitations was inadequate, as applied in this case, Allen is
20 not entitled to relief on Ground 7. The court finds the claims in Ground 7 to be without merit.

21 As the Nevada Supreme Court has not ruled on the claims in Ground 7 of Allen’s federal
22 habeas petition, this court considers those claims de novo. *See Chaker*, 428 F.3d at 1221; *Lewis*, 391
23 F.3d at 996.

24 The court has determined, ruling on the claims de novo, that Grounds 3 and 4 are without
25 merit. *See* discussion, *supra*, regarding Grounds 3 and 4. Therefore, Ground 7 also fails.

26 Certificate of Appealability

27 The standard for issuance of a certificate of appealability calls for a “substantial showing
28 of the denial of a constitutional right.” 28 U.S.C. § 2253(c). The Supreme Court has interpreted

28 U.S.C. § 2253(c) as follows:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir.2000). The Supreme Court further illuminated the standard in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, “[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”

Miller-El, 123 S.Ct. at 1040 (quoting *Slack*, 529 U.S. at 484).

The court has considered the issues raised by Allen, with respect to whether they satisfy the standard for issuance of a certificate of appeal, and the court determines that a certificate of appealability is warranted with respect to Ground 3. The court will grant Allen a certificate of appealability regarding that claim. Regarding all other issues resolved in this order, the court determines that a certificate of appealability is not warranted.

IT IS THEREFORE ORDERED that petitioner’s Amended Petition for Writ of Habeas Corpus (ECF No. 27) is **DENIED**.

IT IS FURTHER ORDERED that petitioner is granted a certificate of appealability with respect to Ground 3 of his Amended Petition for Writ of Habeas Corpus (ECF No. 27); in all other respects, petitioner is denied a certificate of appealability.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated this 4th day of August, 2014.


LARRY R. HICKS
UNITED STATES DISTRICT JUDGE